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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
October, 1994, Term

VALERIE K. SYLLA-SAWDON,
Petitioner,

vs.

THE UNIROYAL GOODRICH TIRE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Where: (a) a District Court Scheduling Order issued prior to the effective date of current Fed. R. Civ. P. 26(a)(2)(B), contains provisions similar to the Rule, mandating that each party's experts submit an affidavit stating the expert's opinions; the bases and reasons for the opinions; the data or information on which the expert relied in forming the opinions; the exhibits to be used as a summary or in support of the opinions, and the qualifications of the expert and (b) plaintiff's expert, a consulting forensic engineer, submits an affidavit with attached curriculum vitae containing the information required by the Scheduling Order, and (c) the expert is going to testify that a manufacturer's defect in the vulcanization process caused the tire failure in a one-car accident, then:

(1) must the curriculum vitae be rewritten and expressly tai-

lored to the specific type of testimony (tire failure analysis) to be offered, or is it sufficient to show the expert's general qualifications as a consulting forensic engineer with experience in accident reconstruction, vehicle dynamics, products liability consulting and other aspects of forensic mechanical engineering consultation;

(2) do the standards of Fed. R. Evid. 702 for the admissibility of expert testimony control over the requirements of a trial judge's scheduling order, where the Scheduling Order has in fact been complied with, although in a more abbreviated fashion than the comparable affidavit by the defense expert?

2. Do the standards and procedures for admitting scientific expert evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, – U.S. –, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993), including but not limited to whether the theory or technique can be or has been tested; whether it has been subjected to peer review and publication; what its known or potential error rate is; and the existence and maintenance of standards controlling its operation, apply to the admission of expert testimony based on technical or other specialized knowledge?

3. In a wrongful death suit filed in state court which was removed to the District Court on the basis of diversity jurisdiction, does state law or federal law govern closing argument references by defense counsel asking the jury to draw adverse inferences from the failure of plaintiff to produce an expert witness

when the expert's testimony was excluded as a result of the objections of defendant, where under state law the comments are reversible error, but the Court of Appeals has found that under federal law the comments are not reversible error?

4. Where a tire blows out and causes an accident, and the plaintiff, who was a passenger in the car, but not an owner, preserves the accident tire by obtaining it from the owner's insurance company after the insurance carrier had it removed from the car, but the plaintiff does not obtain and preserve two of the remaining three tires prior to filing suit, does any inherent power of the District Courts to impose sanctions for the destruction or spoliation of evidence prior to filing suit, extend to imposing sanctions for failure to preserve tires which were never in the possession, custody or control of the plaintiff prior to

filing suit, on the theory that: (a) she should have known that one or more defendants might want to examine the other tires, and (b) she *might* have been able to acquire the tires from the salvage yard, when there is no evidence in the record on which to base a conclusion that as a matter of law she could in fact have obtained the tires within any reasonable time after learning they were still on the car?

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REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit appears in *Sylla-Sawdon v. The Uniroyal Goodrich Tire Company*, 47 F.3d 277 (8th Cir. 1995).

JURISDICTIONAL STATEMENT

On February 7, 1995, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the United States District Court for the Western District of Missouri in favor of Defendant The Uniroyal Goodrich Tire Company ("Uniroyal"). Valerie-K. Sylla-Sawdon ("Mrs. Sawdon") Plaintiff-Appellant below, filed a timely petition for rehearing, which was denied on March 22, 1995, by the United States Court of Appeals for the Eighth Circuit. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND OTHER PROVISIONS

Fed. R. Civ. P. 26(a)(2)(B):

Except as otherwise stipulated or directed by the Court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; an exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Evid. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact t understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education,

may testify thereto in the form of an opinion or otherwise.

District Court Scheduling Order ¶ 7(2):

Each party shall disclose to every other party any evidence that party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in written affidavit form, prepared and signed by the witnesses and shall include a complete statement of all opinions to be expressed, and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a list of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding five (5) years.

STATEMENT OF THE CASE

Jurisdictional Background

This case was originally filed by Mrs. Sawdon on August 14, 1992, in the Circuit Court of Jasper County, Missouri, which was the county in which the accident occurred. The case was removed by the then-multiple defendants to the

United States District Court for the Western District of Missouri on the basis of diversity jurisdiction under 28 U.S.C. §1441 (removal), and 28 U.S.C. §1332 (diversity), as the various defendants were residents of states other than Missouri, and Mrs. Sawdon was a resident of Michigan. All defendants except Uniroyal were later voluntarily dismissed by Mrs. Sawdon. Following the trial of the case and a verdict in favor of Uniroyal on February 2, 1994, Mrs. Sawdon filed a timely motion for new trial, which was denied by the District Court on May 13, 1994. Mrs. Sawdon's notice of appeal was filed on May 18, 1994. The appeal to the United States Court of Appeals for the Eighth Circuit was under the authority of 28 U.S.C. §1291.

The judgment of the District Court was affirmed on February 7, 1995, and Mrs. Sawdon's timely-filed petition for

rehearing was denied on March 22, 1995. This Petition for a Writ of Certiorari is filed in ninety days of the date of the denial of the petition for rehearing, pursuant to Supreme Court Rules 13.1 and 13.4.

Factual Background

On August 15, 1989, Mrs. Sawdon was a passenger in a 1984 Mazda GLC owned and driven by Mrs. Yvonne Kirby, Mrs. Sawdon's mother. Mrs. Sawdon was riding in the front passenger seat; her minor son by a prior marriage, Jesse Daniel Durmon, was a passenger in the back seat. While driving on Interstate 44 in Jasper County, Missouri, the left rear tire of the Mazda blew out. Mrs. Kirby lost control of the car, it rolled several times and ended in the highway median. The boy died as a result of the accident.

Following the accident the car was towed to Joplin and left with a salvage

yard. Mrs. Kirby sold the car to her insurance carrier on September 29, 1989. Either before or after the sale, but on a date not known, the insurance company removed the left rear (accident) tire from the car. At some unknown date, Mrs. Sawdon's prior attorneys (a firm in Michigan) had the car inspected. At the time of, or prior to, that inspection, the attorneys acquired possession of the rear seatbelt(s) of the Mazda.

A report about the inspection of the car, dated December 5, 1989, indicates that at the time of the inspection, there were tires on the front of the car. Nothing in the record demonstrates that the front tires on the car at the time of the inspection were in fact the same tires that were on the car at the time of the accident. On December 12, 1989, title to the car was actually transferred to the insurance company, and on December

15, 1989, the insurance company sold the car to the salvage yard where it had been stored.

In April of 1991, Mrs. Sawdon's present attorneys purchased the car from the salvage yard. At the time of purchase there were no front tires on the car. Nothing in the record indicates when, between the unknown date of the car inspection in the fall of 1989 and April of 1991, the front tires were removed, and by whom.

After removal, trial began in the District Court at the end of January, 1994.

Two of the tires on the 1984 Mazda had been purchased in 1987, and two had been purchased in 1988. On Uniroyal's motion, the District Court sanctioned Mrs. Sawdon for failing, prior to the filing of the suit, to acquire and preserve the front tires so that they would

be available during discovery for any defendant's inspection and/or testing. The District Court sanction was to set July 6, 1987, as the date of purchase of the accident tire, which led to the inference that the accident tire had substantially more miles on it than if it had been purchased in 1988, closer in time to the accident in the summer of 1989.

Prior to the trial, the District Court issued an order containing the provisions quoted above at page 3 of this Petition. The affidavit submitted by H. Boulter Kelsey, Mrs. Sawdon's expert, appears in the opinion of the Eighth Circuit attached as an Appendix, at Appendix 34-35 (footnote 3 of the opinion). Mr. Kelsey's curriculum vitae, which was attached to the affidavit, appears in the Appendix at Appendix 39-43. The curriculum vitae does not mention specific experience in tire manufacturing or tire

failure analysis, but does show Mr. Kelsey's educational and professional background in accident reconstruction, vehicle dynamics, product liability analysis, etc.

Uniroyal thereafter took the deposition of Mr. Kelsey, during which his education, training and experience were extensively explored. This background from Mr. Kelsey included teaching a college-level course in which tire manufacturing was one of the topics covered. Mr. Kelsey also testified about racing cars every weekend from 1958-1974; about the types of tires he used; about his interest in preventing tire failure since tire failure could cost a life; about his experience with tire failures and his examination of them, and his efforts to learn about tires, what caused them to fail, and how to keep them functioning. Mr. Kelsey testified in his deposition

about tire failures from under inflation; about beginning full-time forensic consulting in 1980, although he had been inspecting tires in connection with forensic consulting since 1976. He testified he had examined some 2000 tires in his career, including tires that failed and tires that did not. He had been asked 20-25 times in his career to specifically determine if a manufacturing defect caused a tire failure and in about two-thirds of those cases he was unable to support the theory of a manufacturer's defect. During his deposition, he also went over some of the cases in which he had testified which involved a tire.

Prior to the trial, as a result of Uniroyal's motion in limine, and having read Mr. Kelsey's deposition, the District Court ruled that he could testify as to the content of his affidavit and nothing else, and also stated that the

Court was not ruling that Mr. Kelsey was qualified as an expert, but only that his testimony was limited to his affidavit *if* he was qualified as an expert.

At the trial, the District Court refused to allow Mr. Kelsey to testify about his experience with tires and tire failure analysis (the experience explained in Mr. Kelsey's deposition, and generally part of vehicle dynamics and accident reconstruction) because his curriculum vitae did not mention work experience with a tire manufacturer, nor did his affidavit include any evidence that he had conducted any tests on the accident tire. The District Court's explanation of its ruling appears in footnote 5 of the Eighth Circuit's opinion, Appendix 36-37.

Prior to the trial, the District Court imposed a sanction on Mrs. Sawdon setting July 6, 1987, as the purchase

date of the accident tire. Evidence showed that two tires had been bought in 1988 and two tires had been bought in 1987. The sanction was imposed as a penalty for Mrs. Sawdon having "failed" to acquire and preserve the other two tires prior to the filing of this suit.

After having successfully precluded Mr. Kelsey from testifying about his opinions on the cause of the tire blow-out, defense counsel was permitted over the objections of Mrs. Sawdon's counsel, to argue in closing that Mrs. Sawdon had failed to produce an expert witness to testify, and asking the jury to draw adverse inferences from that "failure." Under Missouri law such argument would have been reversible error, but the Eighth Circuit ruled that in a diversity case, the propriety of closing argument was governed by federal rather than state law, and that under federal standards the

argument was not error.

REASONS FOR GRANTING WRIT

Question Presented 1.

Certiorari should be granted under Supreme Court Rule 10.1(a) because the opinion of the Eighth Circuit in the case below is in conflict with opinions in the Eighth Circuit itself on the admissibility of expert testimony, and with other Circuit Courts of Appeals. Certiorari should also be granted because the District Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where the District Court refused to allow Mrs. Sawdon's expert to testify at trial about his qualifications to establish his ability to offer opinion evidence under Rule 702, despite the fact that those qualifications were known to both the trial

court and opposing counsel through Mr. Kelsey's deposition, his affidavit and his attached curriculum vitae. Lastly, certionari should be granted because the District Court and the Eighth Circuit has decided an important question of federal law which has not been, but should be decided by this Court.

The opinion of the Eighth Circuit, sanctioning the proceedings in the District Court, clearly demonstrates the massive confusion below about precisely what happened and why it happened, and the legal basis, if any, for what the District Court did, or for affirming the District Court's actions. This confusion is especially reflected in the conflicting reasons given by the trial court during the trial, and afterwards in denying Mrs. Sawdon's motion for a new trial, about why Mr. Kelsey's testimony was excluded.

The District Court's Scheduling Order set forth the contents of an affidavit to be supplied by Mr. Kelsey. Every element of the affidavit required by the Scheduling Order to be in Mr. Kelsey's affidavit is in fact in the affidavit. The difference between Mr. Kelsey's affidavit and the affidavit filed by Uniroyal's expert is nothing more than length. Mr. Kelsey's affidavit says that based on a visual examination of the tire he concluded that the cause of the tire failure was a manufacturing defect. The Uniroyal affidavit states that based on a visual examination of the tire, he concluded it was not a manufacturing defect which caused the blow-out, and offered an alternative theory on causation.

The difference in the curricula vitae accompanying the affidavits was that the Uniroyal expert (an employee of Uniroyal) showed experience working with

a tire manufacturer; Mr. Kelsey's showed experience as a consulting forensic engineer with experience in accident reconstruction, vehicle dynamics, product liability consulting, etc.

Prior to trial, the District Court expressed its displeasure with Mr. Kelsey's comparatively short affidavit by ruling in response to Uniroyal's motion in limine that Mr. Kelsey's opinions at trial would be limited to what he stated in his affidavit, provided Mr. Kelsey could be qualified as an expert. At trial, however, the process of qualification suddenly shifted from the standards to be applied under Rule 702, to a new, unstated but clear sanction limiting Mr. Kelsey to establishing his qualifications solely through testimony as to the literal content of the curriculum vitae he had attached to his affidavit.

In *Fox v. Dannenberg*, 906 F.2d 1253,

1255-56 (8th Cir. 1990), the Eighth Circuit held:

> The question of whether expert testimony should be admitted or excluded is a matter governed by federal, rather than state, law. [Citations omitted.] Federal Rule of Evidence 702 provides the standard for the admissibility of expert testimony in federal court. It states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. [Citation omitted.] The Advisory Notes to the Rule comment that "[t]he rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge. Similarly, the expert is viewed, not in a narrow sense, but

as a person qualified by 'knowledge, skill, experience, training or education.'" [Citation omitted.] In *Larabee v. M M & L Intern. Corp.*, 896 F.2d 1112 (8th Cir. 1990), we quoted with approval a leading scholar's statement that "'doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility.'" *Id.* at 1116 n. 6 (citation omitted). That point is also implied in our statement in *Hurst v. United States*, 882 F.2d 306 (8th Cir. 1989), that "[a] trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the factfinder." *Id.* at 311 (citation omitted.). *See also Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (stating that "if an expert opinion is so fundamentally unsupported that it can offer no assistance to the jury, then the testimony should not be admitted" (citation omitted)). We believe that these authorities stand for the proposition that Rule 702 was intended to function as a broad rule of admissibility. [Citation omitted.]

It is important also to note that Rule 702 "does not rank academic training over demonstrated practical experience...." [Citation

> omitted.] That is, an individual can qualify as an expert where he possesses sufficient knowledge gained from practical experience, even though he may lack academic qualifications in the particular field of expertise. [Citations omitted.]
>
> The threshold question of whether a witness is competent as an expert is solely for the trial judge, and, as the text of Rule 702 suggests, the central issue is whether the expert's testimony will assist the trier of fact. The weight of the testimony is for the trier of fact. [Citations omitted.] The trial court's decision "will not be reversed unless there is a clear abuse of discretion or a clear error of law." [Citations omitted.]

These are the generally accepted standards for determining whether expert testimony is necessary, and if it is, whether the proposed expert is qualified to testify. No one in this case disputes the fact that expert testimony was necessary under Rule 702; the focus was solely on whether Mr. Kelsey was qualified to testify as an expert.

As the Eighth Circuit itself recognized in *Fox*, Rule 702 is intended to be a broad standard for admissibility of expert opinion, letting even weak or shaky expert opinions go to the jury so that the jury can be the arbiter of weight and believability. Similarly, this Court has noted in *Daubert*, *supra*, at 113 S. Ct. at 2798, that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

But in this case, the District Court, with the Eighth Circuit's eventual approval, did something for which neither the District Court, Uniroyal, nor the Eighth Circuit have ever cited a single case in support: (1) preventing a proposed expert from testifying about his qualifications because every jot and tit-

tle of his qualifications were not contained in his curriculum vitae, despite the fact that the trial court *and* the parties all knew from Mr. Kelsey's deposition about his extensive practical experience with tire failures and tire failure analysis in the combination of 15 years of racing followed by another 15 years of professional experience as a consulting forensic engineer, as well as his academic experience, and then (2) holding Mr. Kelsey was not qualified because he did not testify about his experience with tires, and because he had done no testing on the accident tire.

It should be noted, however, that the District Court's use of the word "test" and the Eighth Circuit's use of the word, suggest that testing is limited to the application of some external device or apparatus to the product being examined in order to determine the char-

acteristics of the product, *e.g.*, applying a chemical to a piece of rubber to determine the reaction of the rubber to the chemical, and from that reaction reaching certain conclusions. This is not necessarily true, and should not be held to be an accurate definition of testing as a matter of law. For example, *Webster's Third New International Dictionary* (1986), defines "test" in pertinent part at 2361-2362:

> ...an act or process that reveals inherent qualities...the procedure of submitting an empirical statement to observational or experimental conditions designed either to negate it or confirm it...a procedure for determining the performance characteristics (as of a product or a machine).... [Emphasis added.]

A "test" can thus be a process of observation, which could mean visual examination only, without actually touching the object, or it could mean manually touching the product to examine or determine

its characteristics, or a combination. And the physical examination of the tire by Mr. Kelsey would clearly constitute a "test" of the tire to determine its condition, and the cause of that condition.

There is not a single case cited by any party which holds that the brevity of an affidavit is grounds for imposition of sanctions, much less that a District Court has any power, inherent or otherwise, to impose sanctions on such a basis, particularly when every required element was present in the affidavit.

There is not a single case cited by the District Court, Uniroyal or the Eighth Circuit, which holds that the standards for determining the admissibility of expert testimony under Rule 702 take second place to a trial court scheduling order, no matter how close the terms of that order may have come to a Federal Rule of Civil Procedure which

went into effect at a later date.

There is not a single case cited by the District Court, Uniroyal or the Eighth Circuit which holds that employment by a tire manufacturer is a condition precedent to being qualified to testify as an expert about either tire failure or a tire failure being caused by a manufacturing defect.

There is not a single case cited by the District Court, Uniroyal or the Eighth Circuit which holds that testing of any tire, much less testing of the accident tire itself, is a condition precedent to an expert being qualified to testify about the cause of the tire failing. This is particularly true where the expert the District Court did allow to testify on behalf of Uniroyal did no testing himself of the accident tire, but simply based his conclusions on a visual examination, just as Mr. Kelsey did.

The error in refusing to allow Mr. Kelsey to establish his qualifications by trial testimony about his experience with tires is made more egregious by the fact that Uniroyal chose to take Mr. Kelsey's deposition. Uniroyal, prior to the taking of Mr. Kelsey's deposition, notified Mrs. Sawdon's counsel that Uniroyal considered the affidavit and curriculum vitae to be inadequate and not in conformance with the requirements of the Scheduling Order.

Having taken that position, Uniroyal should have had two choices: to decline to take Mr. Kelsey's deposition and stand on the position that he could not testify about his experience with tire failures and tire failure analysis because his affidavit and curriculum vitae did not contain any mention of such experience, or to waive that position, and take Mr. Kelsey's deposition. Instead of the deposition constituting a waiver of any

claim of insufficient information about Mr. Kelsey's qualifications and experience, Uniroyal wound up having its proverbial cake and eating it, too. Uniroyal took Mr. Kelsey's deposition, acquired complete information about Mr. Kelsey's education, training and practical experience as a consulting forensic engineer in general and with reference to tire failures and tire failure analysis, and with that information in hand, complained that because the curriculum vitae did not specifically mention experience as an employee of a tire manufacturer, or testing of tires generally, or testing of the accident tire specifically, Mr. Kelsey should not be allowed to testify in court about the information Uniroyal had in its possession, and the information the trial court acquired by the time of trial: the contents of Mr. Kelsey's deposition.

Yet despite the trial judge's admission that he had read Mr. Kelsey's deposition, he still claimed to have no knowledge about whether Mr. Kelsey had "tested anything to determine the characteristics that [a] tire demonstrates when it is under inflated and over inflated." [Appendix at 36.] Common sense alone says that an under-inflated tire will wear in a certain way, and that an over-inflated tire will wear in a different way. Observation of the separate wear patterns from running over- or under-inflated is the functional equivalent of conducting a "test" using some unspecified, unknown external device or apparatus to examine or react with the tire in order to reach a conclusion about its condition and the cause of its condition.

But Mr. Kelsey's deposition was taken. Uniroyal had every bit of information in its possession that it needed

in order to defend itself against Mr. Kelsey's opinion that a Uniroyal manufacturing defect and not some other factor caused the tire to blow out and kill Mrs. Sawdon's son.

Despite the trial judge's claim about a lack of knowledge about Mr. Kelsey's experience with tires, the District Court's admission of reading the deposition should have negated that claim. There is now and never has been a legal basis for asserting that Mr. Kelsey was not qualified to testify because his affidavit and curriculum vitae contained no specific reference to employment by a tire manufacturer or to tire failure analysis, when the parties and the trial court were in possession of all the facts, and only the judge's refusal to allow those facts to be brought out at trial prevented the trial court from determining Mr. Kelsey's qualifications

based on a proper Rule 702 analysis of *all* of Mr. Kelsey's background, training, skill, experience, education, and knowledge. In essence, the trial court said, "You can't testify about your knowledge of tire failure analysis," and then ruled, "Because you didn't testify about your knowledge of tire failure analysis you aren't qualified to give expert testimony." And the basis for not allowing him testify at trial about his knowledge of tire failure analysis was that the affidavit and curriculum vitae did not mention tire manufacturing or tire testing.

The entire focus of the Eighth Circuit's opinion on the subject of Mr. Kelsey's testimony about his qualifications is that it was a proper sanction for his purported failure to comply with the District Court's Scheduling Order. Yet the cases cited by the Eighth Circuit in its opinion in support of this conclu-

sion are all cases in which a sanction was imposed as a penalty for failing to comply at all with a court order or discovery requirement or local rule with the result that the opposing party was provided with no information at all, or complying so late that the opposing party did not have sufficient time to prepare. *See, e.g., Harris v. Steelweld Equipment Company*, 869 F.2d 396 (8th Cir.), *cert. denied*, 493 U.S. 817 (1989); *Blue v. Rose*, 786 F.2d 349 (8th Cir. 1986); *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290 (7th Cir. 1989) and *Jenkins v. Whittaker Corporation*, 785 F.2d 720 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986).

The logic which the Eighth Circuit purports to "extend" is that if a party has no notice of the qualifications and opinions of an opposing expert, it cannot adequately prepare for trial, and there-

fore failure to provide that information precludes the expert testimony. Yet here, Uniroyal had all of the information, and obviously could and did prepare for trial. There is no relationship between the principles cited by the Eighth Circuit and the facts of this case, and thus there is a substantial conflict between not only the Eighth Circuit's opinion in *Fox, supra*, on the standard to be applied to determine the qualifications of an expert, but also between the Eighth Circuit's opinion in this case and the cases in the Seventh and Ninth Circuits on which it supposedly relies.

In addition, the Eighth Circuit commented that Mr. Kelsey's affidavit would also constitute a failure to comply with present Rule 26(a)(2)(B). This statement in and of itself raises very important federal questions which this Court should resolve about the new Rule 26(a)(2)(B):

(1) whether the length of an affidavit or report which contains responses to all the components of the Rule is determinative of compliance with the Rule, and (2) whether experts must constantly rewrite their curricula vitae in order to tailor this *summary* of their background, education, training and experience to reflect knowledge of the precise subject matter about which they are going to testify, and (3) whether employment experience in the specific subject matter area is a condition precedent to qualification as an expert, and (4) whether the testing of a product whose defective design or manufacture is at issue is a condition precedent to either qualification as an expert, or to the ability to offer an opinion on whether there is in fact a defect in the design or manufacture of the product.

The Eighth Circuit, by upholding the

decision of the District Court in this case, has painted with a broad brush, and used such sweeping strokes, that it has for all practical purposes negated the standards of Rule 702, and instead substituted a much too restrictive and narrow construction of Rule 26(a)(2)(B) (and in essence of the District Court's Scheduling Order) that destroys the concept of broad admissibility of expert opinion. This is particularly true where the District Court subjectively decided, and the Eighth Circuit agreed, that brevity was an indication or demonstration of bad faith.

This Court also needs to decide whether the principles of *Harris*, *Blue*, *Simplex*, and *Jenkins*, *supra*, should be extended to include factual settings where the expert affidavit/report in fact complies with the requirements of the particular rule, local or otherwise, de-

spite any "inadequacies" perceived by the District Court or opposing counsel, and where the opposing party has deposed the expert long before trial so that all of his qualifications and opinions are known.

Mrs. Sawdon was done a manifest injustice by the District Court's denial of an opportunity for Mr. Kelsey to establish his credentials by testifying at trial about his prior experience, some 30 years' worth, with tire failures and tire failure analysis, solely on the basis that his curriculum vitae and affidavit did not expressly mention employment by a tire manufacturer and testing of tires, in particular testing the accident tire for information that he concluded was present as a result of his manual and visual inspection (test) of that tire.

Under this Court's Rule 10.1(a) and (c) certiorari is particularly appropri-

ate.

Question Presented 2.

The District Court initially ruled at the trial that under *Daubert, supra,* Mr. Kelsey did not have any basis for rendering an opinion. Although the Eighth Circuit said that it need not reach that point, in substance if not in form that point was reached, since the trial court's *Daubert* ruling was based on the fact Mr. Kelsey had never worked for a tire manufacturer and disclaimed expertise in the area of manufacturing tires, and the fact he had done no testing of tires generally and/or of the accident tire in particular.

Daubert, however, makes it clear that there are three separate categories of knowledge which can form the basis of expert opinion: scientific, technical, and "other specialized knowledge." This

Court said at 113 S. Ct. 2795, note 8:

> Rule 702 also applies to "technical, or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

The nature of the expertise offered in this case, however, is not scientific, but instead falls within the category of technical knowledge, or other specialized knowledge. Yet arguments were made below about the purported lack of validity of Mr. Kelsey's methodology in determining the cause of the tire failure which killed Mrs. Sawdon's son. One of the *Daubert* holdings is the necessity for the trial court to make a preliminary determination of whether the underlying reasoning or methodology of the proposed expert testimony is scientifically valid and can properly be applied to the facts of the case. One of the considerations for a trial judge in making that decision

is whether the theory or methodology or technique has been, or even can be, tested.

And that criterion of testing is what was applied to Mr. Kelsey's testimony, affidavit and curriculum vitae under *Daubert*. But that criterion comes from the offering of scientific, not technical expertise.

The Ninth Circuit has recognized that *Daubert* is limited to presentation of scientific expert testimony, *Thomas v. Newton International Enterprises*, 42 F.3d 1266, 1270, note 3 (9th Cir. 1994). The Eighth Circuit has held broadly that *Daubert* now controls the admissibility of all expert testimony. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1406 (8th Cir. 1994).

In *Hopkins v. Down Corning Corporation*, 33 F.3d 1116 (9th Cir. 1994), the Ninth Circuit applied *Daubert* to scien-

tific issues concerning a causal link between silicone breast implants and mixed connective tissue disease. In *United States v. Muldrow*, 19 F.3d 1332 (10th Cir. 1994), the Tenth Circuit cited *United States v. Markum*, 4 F.3d 891, 895-896 (10th Cir. 1993) for the proposition that *Daubert* requires the trial court to "determine whether the expert is proposing to testify to (1) scientific, technical or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." The Tenth Circuit cited *Daubert, supra*, at 2796, as support for this statement, yet this Court's precise language is: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert, supra*, at 2796.

The post-*Daubert* cases involving an

application of Rule 702 for the most part are concerned with the admission of scientific evidence, *e.g.*, *Hopkins*, *supra*. However, while some of the Courts of Appeals recognize this Court's limitation of *Daubert* to scientific expert testimony, *e.g.*, *Thomas*, *supra*, others are apparently willing to extend its reach to "technical or other specialized knowledge," *e.g.*, *Markum*, *supra*.

This case presents an opportunity for the Court to clarify the reach of *Daubert* and in what fashion, if any, the principles it enunciated governing admissibility of scientific expert testimony under Rule 702 can be extended or should be extended to expert testimony involving technical or other specialized knowledge. This case also presents an opportunity for the Court to directly address the issue of what standards are to be applied, particularly in determining the qualifi-

cations of an expert and the admissibility of his testimony in light of the combination of *Daubert* and the Court's recent adoption of revised Fed. R. Civ. P. 26(a)(2)(B).

Question Presented 3.

In the District Court, Mrs. Sawdon offered H. Boulter Kelsey, a consulting forensic engineer with a bachelor's and master's degree in mechanical engineering, as an expert to state his opinion on the reason the tire failed in this case. Uniroyal successfully moved to prevent him from testifying about his opinions on the tire failure, and then in closing argument defense counsel commented on Mrs. Sawdon's failure to offer the testimony of an expert about why the tire failed.

Certiorari should be granted to review the split in the Circuit Courts of Appeals on whether state or federal law

controls closing argument in diversity cases, and within the Eighth Circuit itself, which has some panel opinions applying state law, and other opinions applying federal law.

In *Delaporte v. Robey Building Supply, Inc.*, 812 S.W.2d 526, 533 (E.D. Mo. App. 1991), the Missouri Court of Appeals held that:

> [i]t is reversible error for an attorney to ask a jury to draw an adverse inference from failure to produce a witness when the witness was excluded on the attorney's motion. [Citation omitted.]

Similarly, the Missouri Court of Appeals also has said:

> When a witness' testimony is excluded on an attorney's motion, it is misconduct constituting manifest injustice and thus reversible error if that attorney requests the jury to draw an adverse inference from his opponent's failure to produce that witness even though the error is not preserved for appellate review. [Citations omitted.]

Calvin v. Jewish Hospital of St. Louis,

746 S.W.2d 602, 605 (E.D. Mo. App. 1988).

In this trial, defense counsel made several comments about the "failure" of Mrs. Sawdon to produce expert testimony on the subject of tire failure. Plainly, under Missouri law, those comments in closing argument would constitute reversible error, since it was defense counsel's motion which kept Mr. Kelsey from testifying.

However, the Eighth Circuit cited *Vanskike v. Union Pacific Railroad*, 725 F.2d 1146 (8th Cir 1984) and *Geimer v. Pastrovich*, 946 F.2d 1379 (8th Cir. 1991) as the basis for its holding that federal rather than state law governs the propriety of closing arguments in a diversity case. In doing so, the Eighth Circuit overlooked the fact that it has also held that it is *state law* which governs in such a setting: *Johnson v. Richardson*, 701 F.2d 753 (8th Cir. 1983) and *Campbell*

v. Johnson, 786 F.2d 892 (8th Cir. 1986).

In *Putnam v. DeRosa*, 963 F.2d 480 (1st Cir. 1992), the First Circuit expressly applied Massachusetts law to the question of the propriety of argument. (Although the First Circuit did not find a breach of the state law, the important point is that the First Circuit applied state rather than federal law.) Similarly, the Seventh and Eleventh Circuits have applied state law with reference to arguments to the jury: *Cook v. Hoppin*, 783 F.2d 694 (7th Cir. 1986) (Illinois law); *Southern v. Plumb Tools*, 696 F.2d 1321 (11th Cir. 1983) (Alabama law), looking to the substantive law of the state in determining the propriety of particular comments upon the evidence.

The question is also presented whether, under *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed.2d 1188 (1938), this principle of Missouri

law is considered part of the substantive law of Missouri which must be applied in this diversity wrongful death case.

Under Supreme Court Rule 10.1(a), there is a clear conflict in the Circuit Courts of Appeals on the subject of whether state or federal law controls the propriety of closing argument in diversity cases, and certiorari is thus appropriate.

Question Presented 4.

The accident car in this case was owned by Mrs. Kirby, Mrs. Sawdon's mother. Following the accident, Mrs. Kirby's insurance carrier removed the tire which blew out, and at some point in their investigation of potential claims by Mrs. Sawdon, her prior attorneys acquired the seatbelts from the car, and obtained the blown-out tire from the insurance carrier.

The accident car was sold to the insurance company on September 29, 1989. An unsigned inspection report dated December 5, 1989, with the inspection presumably carried out at the request of Mrs. Sawdon's prior attorneys, indicates the front tires were still on the car as of the (unspecified) date of inspection in Joplin, Missouri, where the car had been left after the accident. Title was transferred to the insurance company on December 12, 1989; the car was sold to the salvage yard in Joplin on December 15, 1989. Mrs. Sawdon's present attorneys purchased the accident car from the salvage yard in April of 1991, but by that time the front tires were gone. Suit was initially fled in August of 1992.

It is clear that Mrs. Sawdon could not have violated Rule 37, by "failing" to produce the front tires for inspec-

tion, since she never had possession, custody or control of them. Her "failure" to preserve the front tires could therefore be sanctionable only under an inherent power of the District Court.

Mrs. Sawdon agrees that the inherent power to impose sanctions does exist—what she challenges is whether that power extends to factual settings in which: (a) the sanctioned party never had possession, custody or control of the evidence at issue, and (b) the sanctioned party is required as a matter of law to determine how the defense will conduct its case and what evidence it will want to use, and (c) the sanctioned party is required as a matter of law to acquire that evidence and preserve it, regardless of cost, even where there is no evidence in the record that at the time the sanctioned party's attorneys learned of the existence of the

evidence, it would still have been possible to acquire it.

The record in this case shows that a report was prepared on December 5, 1989, which noted the presence of two tires on the front of the car. There is absolutely no evidence which conclusively proves or even suggests that as of the date the inspection was done (at some unknown time prior to December 5, 1989), the two front tires which were on the car were in fact the front tires which were on the car at the time of the accident. Likewise, there is no evidence in the record that at the time Mrs. Sawdon's prior attorneys received the report—on an unknown date after December 5, 1989—that the front tires were at that point in time still on the car.

The report noting there were two front tires on the accident car was dated Tuesday, December 5, 1989. Assuming the

report was mailed to Mrs. Sawdon's prior attorneys on that same day (an assumption only, since this is not supported by any facts in the record), and allowing the usual three days for mailing, the attorneys received the report on Friday, December 8, 1989. On Tuesday, December 12, 1989, title to the accident car was formally transferred to Mrs. Kirby's insurance company. On Friday, December 15, 1989, the car was sold to the salvage yard in Joplin from whom Mrs. Sawdon's present attorneys later purchased the car.

There is no evidence in the record that the tires on the car at the time of the inspection were in fact the same tires that were on the car at the time of the accident. There is no evidence in the record as to when the front tires were removed. They could have been removed by anyone at any time after the in-

spection was done. Thus, the Eighth Circuit's ruling almost requires psychic powers on the part of Mrs. Sawdon and her prior attorneys, since sanctions were imposed for failing to take action to preserve evidence when it is entirely possible that the evidence was disposed of (the front tires were removed from the car) prior to the time Mrs. Sawdon and her prior attorneys were even aware the evidence existed.

In order to impose a sanction on Mrs. Sawdon under the District Court's inherent powers, both it and the Court of Appeals had to resort to an inordinate and entirely inappropriate and legally unwarranted amount of speculation and conjecture.

The decision of the Eighth Circuit below also conflicts with both its own holding in *Dillon v. Nissan Motor Company, Ltd.*, 986 F.2d 263 (8th Cir. 1993)

and *Beil v. Lakewood Engineering and Manufacturing Company*, 15 F.3d 546 (6th Cir. 1994). In both cases, sanctions were imposed for destruction or spoliation of evidence, prior to the filing of the suit, *where the evidence was in the possession or control of the party causing its destruction or spoliation.* In *Dillon*, plaintiffs' counsel sent the accident car to an expert who concluded that there were design defects in it; local police required the car to be moved; it went to a salvage yard, and the plaintiffs' lawyers knew where the car was and had a minimum of two weeks in which to do something about it, but failed to prevent the car from being destroyed. In *Beil*, following a home fire and a death, the insurance company paid the claim and acquired subrogation rights. Earlier it had hired an independent company to investigate the cause of the fire; the com-

pany in turn hired a Mr. Yuellig, who took possession of a water heater and extension cord, concluding that a defective water heater caused the fire. He made several attempts to find out what to do with the water heater and extension cord after submitting his report and saying he would hold them a reasonable time. After three months, he discarded them. Because of the series of contracts, Mr. Yuellig was effectively an agent or employee of the insurance company, so that the insurance company could be held accountable through sanctions for the discarding of the evidence prior to suit being filed.

Under Supreme Court Rule 10.1(a), the Eighth Circuit's affirmation of the sanctions in this case conflicts with the principles in *Dillon* and *Beil*, *supra*, that sanctions may be imposed for destruction or spoliation of evidence prior to the filing of the suit only where the

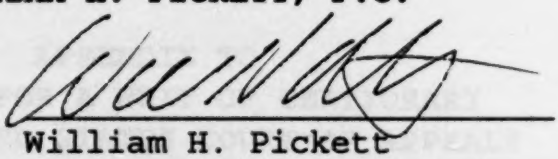
evidence was in fact in the possession, custody or control of the party being subsequently sanctioned. Under Rule 10.1(c), the issue of the proper parameters to be applied in determining whether sanctions should be imposed for destruction or spoliation of evidence prior to the filing of suit is an important question of federal law which should be resolved by this Court. Certiorari is thus appropriate.

CONCLUSION

For all the reasons previously stated, Petitioner prays that the Court grant this request for a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, to review and decide all issues presented in this Petition.

Respectfully submitted,

WILLIAM H. PICKETT, P.C.

By: 

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
October, 1994, Term

VALERIE K. SYLLA-SAWDON,
Petitioner,

vs.

THE UNIROYAL GOODRICH TIRE COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2267

Valerie K. Sylla-Sawdon, individually and as personal representative of the estate of Jesse Daniel Durmon, decedent, a minor,	*	
Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
v.	*	
Uniroyal Goodrich Tire Company, a Delaware corporation,	*	
Appellee.	*	

Submitted: December 13, 1994

Filed: February 7, 1995

Before MAGILL, Circuit Judge, BEAM, Circuit Judge, and PIERSOL, District Judge.*

PIERSOL, District Judge.

Valerie K. Sylla-Sawdon, individu-

ally and as personal representative of the estate of her deceased minor son, Jesse Daniel Durmon, appeals from the judgment entered by the district court[1] following a jury verdict in favor of Uniroyal Goodrich Tire Company (Uniroyal), and from the district court's denial of her new trial motion. For the reasons discussed below, we affirm.

On August 15, 1989, Sylla-Sawdon and her six-year-old son, Jesse Durmon, Michigan residents, were riding as passengers in a 1984 Mazda driven by Sylla-Sawdon's mother, Yvonne Kirby, on a trip from Michigan through Missouri en route to Arizona. Sylla-Sawdon sat in the right front passenger seat, and Jesse sat in the rear center passenger seat. As Mrs. Kirby drove westbound on Interstate 44 near Joplin, Missouri, the left rear tire on the car blew out. Mrs. Kirby lost control of the car, which crossed

the median and rolled at least twice. Jesse sustained severe injuries that resulted in his death. The accident occurred just after 6 o'clock in the evening. It was still daylight, and the road was level and dry. Missouri Highway Trooper Bobby Smiles, who responded to the accident scene, did not find any roadway obstruction that could have contributed to the accident. He checked the box for "vehicle defect" on his accident report.

Sylla-Sawdon filed suit in Missouri state court alleging claims for wrongful death and strict liability against several defendants. Uniroyal removed the action to federal court. Sylla-Sawdon voluntarily dismissed all defendants except Uniroyal prior to trial. Following a three-day trial, the district court submitted to the jury plaintiff's individual claim and her claim as personal

representative of her son's estate. The jury returned verdicts for Uniroyal. Upon denial of her motion for a new trial, Sylla-Sawdon timely appealed, and she now raises five issues.

I. Sanction for Failure to Preserve Evidence

Title to the Mazda transferred from Mrs. Kirby to her insurer, Metropolitan Property and Liability Insurance Company (Metropolitan), in return for payment of property loss benefits. On December 5, 1989, former attorneys for Sylla-Sawdon inspected the Mazda at the Missouri salvage yard where it was taken after the accident. The inspection report prepared on December 5 described the three Uniroyal "Big O, Legacy" tires that remained on the car, and noted that the fourth tire had been replaced with a short mileage spare.[2] The inspectors asked a mechanic to remove certain seat

belt assemblies, but they took no steps to acquire the remaining tires. On December 15, 1989, Metropolitan sold the car as salvage. On April 12, 1991, Sylla-Sawdon's current attorney bought the car, but by then the front tires had been removed.

Uniroyal's inability to examine the front tires became an issue when Uniroyal learned through sales invoices disclosed in discovery that Mrs. Kirby had purchased two of the four tires on July 6, 1987, and the other two on June 23, 1988. Uniroyal sought to establish conclusively, by tread wear analysis or by the "Dot number" molded on the tires, that the tire which failed was on of the older tires and had more mileage on it. In her videotaped deposition, later shown at trial, Mr. Kirby agreed it was probable that the damaged tire was one of the two older tires. Sylla-Sawdon produced no

other evidence to show that the damaged tire was on of the two newer one purchased in June 1988.

As a sanction for plaintiff's failure to preserve the three undamaged tires as evidence, Uniroyal moved to exclude any evidence that the damaged tire was purchased in 1988. Over plaintiff's objection, the district court granted the motion, finding that Sylla-Sawdon, through her attorneys, knew the front tires existed in December 1989, but she failed to preserve them when she had the opportunity to do so. The district court instructed the jury that the damaged tire was purchased on July 6, 1987.

Sylla-Sawdon argues that the erroneous imposition of this sanction requires a new trial. The parties agree that a district court has discretion to impose a sanction under its inherent disciplinary power. Dillon v. Nissan Motor Co., 986

F. 2d 263, 267 (8th Cir. 1993). Sylla-Sawdon argues, reasoning from Beil v. Lakewood Eng'g and Mfg. Co., 15 F. 2d 546, 552 (6th Cir. 1994), that the automobile was not within her possession or control at the time the tires remained on it in December 1989, her attorneys were contemplating a possible lawsuit alleging a seatbelt defect rather than a tire defect, and their focus at that time explains why they acquired seatbelts mechanisms, but not the tires, from the car. She argues she should not have been penalized for failing to preserve the remaining three tires.

Uniroyal argues the district court committed no clear error in ruling that the damaged tire was purchased on July 6, 1987. Uniroyal contends that sanctions are intended in part as a deterrent, and no deterrent effect is achieved if a plaintiff, who controls the date a law-

suit is brought, can destroy evidence freely until an action is filed. Uniroyal stresses that the proper analysis, followed by the district court, is whether the plaintiff knew or should have known of the evidence, had the opportunity to preserve it, and filed to do so, citing e.g., American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1118 (Ill. App. Ct. 1992) (affirming spoliation sanction against plaintiff, including those who no longer owned or possessed car, because "plaintiffs intentionally allowed" car to be destroyed by salvage dealer after title transferred to insurer). Uniroyal also argues that, in December 1989, Sylla-Sawdon's former attorneys did consider a tire defect lawsuit, and they could have acquired the tires for a nominal sum when they obtained the seatbelt assemblies. Thus, Uniroyal argues the

sanction was properly imposed.

We review the district court's imposition of a sanction under its inherent power as well as the factual basis for the sanction, for an abuse of discretion. See Dillon, 986 F. 2d at 267 (citations omitted). Our review is very deferential, and generally we will not interfere with the great latitude exercised by the district court in discovery matter. SDI operating Partnership v. Neuwirth, 973 F.2d 652, 655 (8th Cir. 1992).

We find no abuse of discretion in this instance. The tires remaining on the vehicle were critical to this litigation because only an examination of all four tires would conclusively establish the date of purchase of the failed tire and the mileage that was on it at the time of the accident. See Dillon, 986 F. 2d at 267 (holding sanction is appropriate if court finds destruction prejudiced

opposing party). Plaintiff's own witness, Mr. Kirby, testified that it was probable the damaged tire was one of the older tires. The record reflects that, at the time of the December 1989 inspection, plaintiff's former attorneys were well aware that the cause of the fatal accident was tire failure and that the attorneys were contemplating a lawsuit claiming tire manufacturing defect. Therefore, they knew or should have known that all of the tires would be relevant and should be preserved as evidence.

Like the district court, we reject Sylla-Sawdon's contention that she did not have ownership or custody of the car and thus, she could not preserve the evidence. Through her former attorneys, she obtained the seatbelt assemblies. Similarly, she could have acquired the remaining tires. Based upon the information before it, the district court did

not abuse its discretion in setting the July 6, 1987 date of purchase as a sanction for plaintiff's failure to preserve the tires. See Dillon, 986 F.2d at 267; SDI Operating Partnership, 973 F.2d at 655.

II. Highway Patrol Report

Sylla-Sawdon next argues that the district court abused its discretion in admitting into evidence over her objection the accident report completed by Trooper Smiles because the report contained hearsay statements. She argues, citing Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1187 (8th Cir. 1981), that the district court should not have admitted the report into evidence as a business record under Federal Rule of Evidence 803 (6) because the source of information in the report was unknown and because there was no testimony about when or under what circumstances the informa-

tion was obtained. She also contends that the district court abused its discretion (1) in permitting Trooper Smiles to testify at trial as to statements made to him by Mrs. Kirby regarding the vehicle's speed just prior to the accident and Jesse's failure to use a seatbelt and (2) in permitting Trooper Smiles to testify that a vehicle defect other than the tire failure caused the accident.

Uniroyal responds that the parties stipulated to admission of the report as a business record, and alternatively, the report was admissible as a public record under Federal Rule of Evidence 803 (8). Uniroyal distinguishes Meder on the ground that both the source of the information and the circumstances under which Trooper Smiles received the information are known, while in Meder neither the source nor the circumstances were known.

Uniroyal contends the district court allowed Trooper Smiles to testify only as to his personal knowledge or information obtained from witnesses at the scene. Regarding seatbelt use, Uniroyal argues that plaintiff injected the issue into the trial through Mrs. Kirby's videotaped deposition, and it was entitled to impeach her testimony with evidence of a prior contradictory statement. Uniroyal states that it did not argue to the jury that failure to wear a seatbelt is a defense to strict liability. Finally, Uniroyal argues that Trooper Smiles testified he checked the "vehicle defect" box on his report because he was referring to the tire that failed, and he did not express an opinion as to whether the tire was defective when manufactured.

We have reviewed the accident report contained in the record, but Sylla-Sawdon has not included within the record on ap-

peal a transcript of Trooper Smiles' testimony. Therefore, we are unable to read his testimony and consider the district court's ruling in context. Accordingly, the lack of a transcript precluded us from conducting any meaningful review of these issues. See Fed. R. App. 10; Schmid v. United Bhd. of Carpenters & Joiners, 827 F.2d 384, 386 (8th Cir. 1987) (per curiam), cert. denied, 484 U.S. 1071 (1988).

III. Expert Testimony

The district court's Scheduling Order required in part as follows:

> (2) Each party shall disclose to every other party any evidence that the party may present a trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in written affidavit form, prepared and signed by the witnesses and shall include a complete statement of all opinions to be expressed, and the basis and reasons therefor; the data or other information relied upon in forming such opinion; any exhibits to be

> used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding five (5) years.

(Appellant's App. at 30.) Sylla-Sawdon designated as an expert witness H. Boulter Kelsey, Jr., a mechanical engineer from St. Louis, Missouri. Kelsey submitted a short affidavit in response to the Scheduling Order.[3] He attached to the affidavit a copy of his curriculum vitae, which showed academic, teaching, and professional experience in mechanical engineering, including "forensic engineering analysis of structural and mechanical defects in design, manufacture, and operation" and "analysis and accident reconstruction in industrial safety, vehicular failure, and product liability." The curriculum vitae also disclosed that Kelsey belongs to many professional organizations and the Sports Car Club of

America, and that he held regional and national racing licenses before he retired form active racing competition. The affidavit and curriculum vitae did not divulge any direct professional experience in tire manufacture or tire failure analysis. In contrast, Uniroyal's expert Richard Harrison, submitted a five-page affidavit which set out in detail the tire examination he conducted in this case, along with the basis for his opinion that the tire failure resulted from a prior severe impact to the tire. Harrison's curriculum vitae revealed extensive professional experience in tire manufacture.

Uniroyal notified Sylla-Sawdon that it did not believe Kelsey's summary affidavit complied with the Scheduling Order. When Kelsey did not supplement the affidavit, Uniroyal deposed him. At the deposition, Kelsey, testified that he did

not consider himself an expert in rubber chemistry, tire design, or the tire manufacturing process. He testified that he does not have any formal training in tire failure analysis and that his employment history bears no relationship to the knowledge he relied upon to reach his opinion in this case. Kelsey explained that his knowledge of tire failures arises from his many years of experience as a competitive race car driver, combined with his mechanical engineering background.

Uniroyal filed a motion in limine to exclude or limit Kelsey's testimony at trial. Uniroyal argued, under Federal Rule of Evidence 702, that Kelsey was not qualified by knowledge, skill, experience, training, or education to render an opinion as to whether the tire failed due to a manufacturing defect. Uniroyal also contended that Kelsey's testimony should

be excluded under Federal Rule of Evidence 403 as more prejudicial than probative.[4] At the hearing on the motion in limine, Sylla-Sawdon's counsel argued that Kelsey should be permitted to testify under Rule 702 because his specialized knowledge would help the jurors understand what caused the tire to fail.

Having read Kelsey's deposition, the district court sustained the motion in limine in part and overruled it in part. The court ruled that Kelsey could testify, but only as to the limited content of his affidavit and "nothing else." the district court observed that Kelsey had "taken rather lightly" the court's Scheduling Order and remarked that Kelsey was a "very weak expert." In response to Uniroyal's request for clarification of the ruling, the court stated:

> [T]hat doesn't mean to say that I am going to qualify him as an expert. You can still object when

> [plaintiff's counsel] goes through his testimony whether he can qualify him in front of the jury as an expert. I am not ruling on that, I am ruling on what he can testify to , if he gets qualified. You have got to qualify him as an expert.

(Appellant's App. at 270.)

At trial, Sylla-Sawdon called Kelsey to the stand and attempted to qualify him as an expert by probing into his experience with tire failures that had not revealed in his affidavit and curriculum vitae. Uniroyal repeatedly objected, and the district court sustained nearly all of the objections.[5] As a result, Sylla-Sawdon failed to qualify Kelsey as an expert before the jury, and Kelsey was not permitted to give his opinion that the tire failed because of a manufacturing defect. In denying Sylla-Sawdon's motion for a new trial on this issue, the district court ruled that plaintiff had "flagrantly disregarded" the court's Scheduling Order. Sylla-Sawdon now ar-

gues that the district court's trial rulings are reversible as an abuse of discretion.

Federal rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

We have said that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990). Thus, we acknowledged in Fox that "an individual can qualify as an expert where he possesses sufficient knowledge gained from practical experience, even though he may lack academic qualifications in the particular field of expertise." Id. We also observed in Fox that "[t]he threshold question of whether a

witness is competent as an expert is solely for the trial judge, and, as the text of Rule 702 suggests, the central issue is whether the expert's testimony will assist the trier of fact." Id. "Once the trial court has determined that a witness is competent to testify as an expert, challenges to the expert's skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility." Id.; Williams v. Pro-Tec, Inc., 907 F.2d 345, 348 (8th Cir. 1990) ; Davis v. American Jet Leasing, Inc., 864 F.2d 612, 614-15 (8th Cir. 1988); Nielson v. Armstrong Rubber Co., 570 F.2d 272, 276-77 (8th Cir. 1978).

Based upon our reasoning in Fox, Sylla-Sawdon urges us to reverse and remand this case for a new trial so that another jury may have the benefit of Kelsey's opinion in deciding this case. Her request essentially asks us to ignore

her expert's cursory response to the district court's Scheduling Order, and this we decline to do. Sylla-Sawdon failed to qualify Kelsey as an expert because he did not abide by the Scheduling Order and Rule 26 (a) (2) (B), although we speculate that plaintiff may have had difficulty qualifying Kelsey as an expert in tire failure analysis even if his pretrial submission had complied with the Scheduling Order. See Garnac Grain Co. v. Blackely, 932 F.2d 1563, 1566 (8th Cir. 1991) (affirming district court's decision not to qualify as experts two witnesses who lacked formal training and possessed limited practical knowledge and experience in subject area of proffered expert testimony).

Federal rules of Civil Procedure 16(f) and 37(b) (2) (B) "authorize district courts to prohibit the admission of evidence proffered by the disobedient

party." United States v. 68.94 Acres of Land, 918 F.2d 389, 396 (3d Cir. 1990); Smith v. Rowe, 761 F.2d 360, 366 (7th Cir. 1985) (same). "The power of the trial court to exclude exhibits and witnesses not disclosed in compliance with its discovery and pretrial orders is essential" to judicial management of the case. Admiral Theatre Corp. v. Douglas Theater Co., 585 F.2d 877, 897-98 (8th Cir. 1978). We do not agree with Sylla-Sawdon that Kelsey's affidavit complied with the district court's Scheduling Order. The affidavit lacked the specificity required by the Scheduling Order and thus failed to give Uniroyal advance notice of Kelsey's qualifications and the substance of his testimony so that Uniroyal could prepare to meet the testimony at trial. See Miller v. Fairchild Indus., Inc., 885 F.2d 498, 512 (9th Cir. 1989), cert. denied, 494 U.S. 1056

(1990).

The failure to comply with the Scheduling Order is not excused because Uniroyal elected to depose Kelsey. At the time the district court entered its Scheduling Order, Federal Rule of Civil Procedure 26 did not require the disclosure of such a report. In 1993, however, Rule 26 was amended to require parties to disclose pretrial expert witness reports similar in nature to the expert witness affidavit the district court required in this case. The commentary to the amended Rule echoes the district court's stated rationale for requiring expert reports: the elimination of unfair surprise to the opposing party and the conservation of resources:

> The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose

> the expert and often was even of little help in preparing for deposition of the witness. Revised Rule 37 (c) (1) provides an incentive of full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not disclosed. . . .
>
> . . . .
>
> . . . Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition.

Fed. R. Civ. P. 26(a) (2) (B) advisory committee's note. The "sketchy and vague" nature of Kelsey's affidavit forced Uniroyal to depose Kelsey to determine his qualifications and the basis for his opinion. Consequently, the necessity of the deposition frustrated the purposes of the district court's Scheduling Order and today would likewise frustrate the purposes of Rule 26(a) (2) (B).

In prior cases, we have upheld ruling by district courts precluding experts from testifying when those experts were not timely disclosed pursuant to pretrial orders and local rules. Harris v. Steelweld Equip. Co., 869 F.2d 396, 399 (8th Cir., cert. denied, 493 U.S. 817 (1989); Blue v. Rose, 786 F.2d 349, 351 (8th Cir. 1986). Accord Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290, 1292 (7th Cir. 1988); Jenkins v. Whittaker Corp., 785 F.2d 720, 728 (9th Cir), cert. denied, 479 U.S. 918 (1986). By logical extension of these cases, we now hold that the district court did not abuse its discretion in limiting Kelsey's testimony of the content of his affidavit as a sanction for his failure to comply with the district court's Scheduling Order. Because the affidavit and its attached curriculum vitae did not disclose any academic or practical experience in

the tire manufacture or tire failure analysis, the district court properly sustained Uniroyal's objections as Sylla-Sawdon attempted to elicit such evidence for the first time at trial.

IV. Closing Argument

Related to the previous issue is Sylla-Sawdon's contention that she was prejudiced at trial by Uniroyal's closing argument. She argues that defense counsel made repeated references to her failure to produce an expert witness to testify as to a tire manufacturing defect:

> [MR. RHODES:] If Mr. Harrison is making all of this up, then why didn't Mr. Pickett put on an expert, a true tire expert.
>
> MR. PICKETT: Your Honor, just a minute. I object. I put on an expert.
>
> THE COURT: Objection overruled. Objection overruled. It's final argument.
>
> MR. RHODES: Why did Mr. Pickett not put on an expert witness

to present competent evidence that this tire was defective at the time that it was made?

MR. PICKETT: I object, Your Honor, for the record, relating to the Court's ruling in that regard, I take personal exception.

THE COURT: Objection overruled.

MR. RHODES: Do you recall Mr. Kelsey? He testified briefly on Monday. There is not one bit of evidence in the record from Mr. Kelsey's testimony that this tire was defective when it was made.

MR. PICKETT: The same objection for the same reason, Your Honor.

THE COURT: Objection overruled.

. . . .

[MR. RHODES:] You are not permitted to speculate, under Judge Whipple's instructions, as to what you thing Mr. Kelsey might have said had he been permitted to testify on a certain point.

. . . .

[MR. RHODES:] Mr. Pickett is required to put on his own proof be-

cause he had the burden of proof in this case. The defense does not have the burden of proof Mr. Pickett has failed to sustain his burden.

. . . .

[MR. RHODES:] Since Mr. Pickett has not presented one single witness who told you that this tire was defective and unreasonably dangerous at the time that it was made, there is simply no evidence upon which you make that finding. He has the burden of proof and he has not carried his burden of proof.

(Appellee's App. at 126-28, 138.) Sylla-Sawdon argues that, in overruling her objections to these comments, the district court improperly permitted Uniroyal to draw an adverse inference form its success in preventing Kelsey from testifying as to his opinion. She contends this is reversible error under Missouri law, citing Delaporte v. Robey Bldg. Supply, Inc., 812 S.W. 2d 526, 533 (Mo. Ct. App. 1991) ("It is reversible error for an attorney to ask a jury to draw an adverse

inference from failure to produce a witness when the witness was excluded on that attorney's motion."), and Calvin v. Jewish Hosp. of St. Louis, 746 S.W. 2d 602, 605 (Mo. Ct. App. 1988) (similar holding).

A Missouri state court might have ruled defense counsel's comments improper under Delaporte and Calvin. As Uniroyal correctly argues, however, the propriety of closing argument in federal court is a procedural question to be determined under federal law. Vanskike v. Union Pac. R.R., 725 F.2d 1146, 1149 (8th Cir. 1984). Under federal law, considerable discretion is given to the trial court to control arguments. " Id. (citation omitted). See also Geimer v. Pastrovich, 946 F.2d 1379, 1383 (8th Cir. 1991) (Gibson, J., concurring) ("I have little hesitation in determining that federal law allows counsel more leeway in com-

menting on the nonproduction of a witness than that allowed under Missouri law.") To constitute reversible error, statements made by counsel in closing argument must be plainly unwarranted and clearly injurious." Vanskike, 725 F.2d at 1149; Hofer v. Mack Trucks, Inc., 981 F.2d 377, 385 (8th Cir. 1992); City of Malden v. Union Elec. Co., 887 F.2d 157, 164 (8th Cir. 1989). We will not disturb a trial court's ruling unless the court abused its discretion. Vanskike, 725 F.2d at 1149.

We see nothing improper in Uniroyal's closing argument. Uniroyal reminded the jury that Sylla-Sawdon had the burden to show a tire manufacturing defect and that she failed to do so. This was proper argument. Defense counsel's remark, "Why did Mr. Pickett not put on an expert witness to present competent evidence that this tire was defec-

tive at the time that it was made?" can reasonably be interpreted to postulate that Sylla-Sawdon might have carried her burden of proof if she had called any competent expert to testify. Given this plausible interpretation of the remark and the district court's broad power to control closing argument, we are not prepared to say that defense counsel's comments were "plainly unwarranted and clearly injurious." See Vanskike, 725 F.2d at 1149; Putnam v. DeRosa, 963 F.2d 480, 487 (1st Cir. 1992). We hold that the district court did not abuse its discretion in overruling plaintiff's objections.

Sylla-Sawdon also argues that the district court erroneously precluded her attorney from arguing in closing that Uniroyal's experts failed to conduct any tests on the damaged tire. Uniroyal contends that the district court prohibited

plaintiff only from arguing in closing that Uniroyal's expert failed to conduct destructive tests on the tire. Because Sylla-Sawdon has not provided a transcript of her counsel's argument and the district court's ruling on this issue, we are precluded form meaningful review. See Fed. R. App. P. 10; Schmid, 827 F.2d at 386.

V. Cumulative Error

Finally, Sylla-Sawdon argues that cumulative effect of the district court's erroneous rulings on the preceding issues requires us to reverse this case and remand for a new trial, citing United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990), and Faught v. Washam, 329 S.W. 2d 588, 604 (Mo. 1959). As Uniroyal argues, there can be no accumulation of error to weigh where we find no error in the district court's rulings. Therefore we reject this final claim as

meritless.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Footnotes

*The HONORABLE LAWRENCE L. PIERSOL, United States District Judge for the District of South Dakota, sitting by designation.

1. The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

2. The tire that failed was also a Uniroyal "Big O, Legacy" tire. It was preserved following the accident.

3. The affidavit reads in its entirety as follows:

> I, H. Boulter Kelsey, Jr. state that it is my opinion that subject Big O tire was defective in

manufacture.

The defect resulted from improper vulcanization which led to air build up between components of the tire resulting in rapid deflation. This rapid deflation caused the accident to occur.

There was no evidence examined indicating that the tire had been run either under or over inflated nor was there any damage associated with a road hazard found.

The data I relied on in forming this opinion was the physical examination of the tire in question and the police report.

The exhibit which supports my opinion is that of the tire in question.

I have attached my resume outlying [sic] my qualifications well as a list of other cases in which I have testified as an expert at trial or in deposition within the preceeding [sic] five (5) years.

4. Additionally, Uniroyal argued that Kelsey's opinion should be excluded under Daubert v. Merrell Dow pharmaceuticals, Inc., ___ U.S. ____, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993), because

his methodology is not recognized in the field of tire failure analysis. We need not reach this issue.

5. At a bench conference, the district court explained its rulings:

> Gentlemen, pursuant to that rule, that affidavit is supposed to be complete in and of itself. Everything he, what he relied on, and what he used as a basis of his opinion; and the basis of his opinion has got to be his experience and knowledge in testing tires and his experience and knowledge in being a mechanical engineer, and not his experience and knowledge in racing cars.
>
> He has performed no test, according to the affidavit, We have no information that he has ever tested anything on tires to determine what characteristic that tire demonstrates when it is run under inflated or over inflated.
>
> He has stated nothing in his affidavit to show that he is familiar with the vulcanization process and whether there was a proper vulcanization or an improper vulcanization. The purpose of that new rule [Fed. R. Civ. P. 26(a) (2) (B)--you

are misreading--702 is only a part of it, but the rule is intended that the affidavit and the basis for his opinion, should be complete in and of itself.

This man has not shown that he is qualified, that he had ever done any tests on tires within his affidavit and in his curriculum vitae. That's why I am not putting his opinions in.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2267

Valerie K. Sylla-Sawdon, etc.	*	
	*	Order Denying
Appellant,	*	Petition for
	*	Rehearing and
v.	*	Suggestion
	*	for Rehearing
The Uniroyal Goodrich Tire Company,	*	En Banc
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 22, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

H. BOULTER KELSEY JR., P.E.
[Curriculum Vitae]

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St. Louis, MO 63146
314/432-5630

Office: Senne, Kelsey & Assoc.
1154 N. Warson Rd.
St. Louis, MO 63132
314/569-2544

EXPERIENCE

July 1981 to present

Senne, Kelsey & Associates, consulting engineering firm, as President and senior consultant. Senne, Kelsey & Associates performs forensic engineering analysis of structural and mechanical defects in design, manufacture and operation; analysis and accident reconstruction in industrial safety, vehicular failure, and product liability. Additional work includes fire and explosion analysis, patent litigation, analysis of construction methods, and traffic analysis. The case load is split evenly between Plaintiff and Defendant with a large additional segment committed to insurance investigation. Teaches part time in Mechanical Engineering Department, Washington University with title of Affiliate Assistant Professor.

July 1980 to July 1981

Sole practitioner as forensic engineer. Part time teaching at Washington University.

July 1973 to July 1980

Assistant Dean, School of Engineering and Applied Science, Washington University. Reported to Dean James M. McKelvey. Responsible for all recruiting and initial financial aid of incoming students, all placement activity for graduates and alumni and the cooperative education program of the School. Additional duties included work with Alumni Relations and Development. Since 1976, taught basic course on the Internal Combustion Engines for Department of Mechanical Engineering. Since 1979, taught course in Graphics and Design for same department. Active consulting practice through Washington University Technology Associates and private practice, primarily in product liability, vehicle dynamics and industrial safety.

April 1971 to July 1973

Assistant Director, Engineering Student Services - Placement Office. Trained as replacement for Assistant Dean Harold Brown.

July 1970 to April 1971

Employed by GEA Airexchangers, Inc., as Project Engineer. Under direction of Mr. William Davis, carried full responsibility for erection and commissioning of large finned tube heat exchangers in the United States and Canada. G.E.A. is an international corporation with home offices in Bochum, Germany.

June 1968 to July 1970

Employed by Permaneer Corporation in the capacity of Staff Engineer. Reported to W.L. Mundy, Vice President of Engineering. Duties consisted of project management, product development, machine design. In 1969, was named Corporate Safety Director with responsibility for company-wide safety program at all production locations in Missouri and Pennsylvania (nine plants).

June 1962 to Jan. 1965

Employed as Assistant Superintendent by W.B. Knight Machinery Company. Duties included purchase of materials, technical liaison between the shop and engineering for both the company staff and customer staff, design work, and general supervision of jobs in the shop.

EDUCATION

B.S. Mechanical Engineering 1966
M.S. Mechanical Engineering 1968

Thesis Title: A Derived Cutting Tool Geometry from Metal Failure Analysis.

Washington University, St. Louis, Missouri.

PERSONAL INFORMATION

Born in St. Louis, 2/1/41
6'0" tall, 200 lbs, good health

ACTIVITIES AND PROFESSIONAL ORGANIZATIONS

American Society for Testing Materials
National Academy of Forensic Engineers, Fellow
National Fire Protection Association
National Safety Council
Society of Automotive Engineers
Illuminating Engineering Society of North America

Missouri P.E. License #21017
National Society of Professional Engineers
Missouri Society of Professional Engineers
Board Certified Diplomate in Forensic Engineering by NAFE, a CESB Member Board

Sports Car Club of America. Held

regional and national racing licenses, now retired from active competition. Crew activity continues.

Private Pilot, Instrument, over 900 hours

PUBLICATIONS

"Investigation of Lawn Mowers for Litigation," NAFE Journal, December 1990

"Accident Reconstruction," St. Louis Bar Journal, Spring, 1992

March, 1993.